Supreme Ct
FILED
(2)
04 137 JUL 2 2 2004
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

JOHN F. TRIPLETT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

CRAIG A. GILLEN, ESQ.
WILMER PARKER, III, ESQ.
Counsel of Record
GILLEN PARKER & WITHERS LLC
One Securities Centre, Suite 1050
3490 Piedmont Road, N.E.
Atlanta, Georgia 30305
(404) 842-9700
Attorneys for Petitioner, John F. Triplett

Wright Appellate Services **0708**
(215) 733-9870 • (800) 507-9020 • Fax (215) 733-9872

QUESTIONS PRESENTED FOR REVIEW

1. Whether or not a business' knowing failure to obtain a targeted profit based upon that business' pricing policies in providing a service is a cognizable property interest within 18 U.S.C. §§ 1341, 1343 or 1346 and, if so, did Petitioner's conduct amount to a taking of such interest?

2. Whether or not judicial enhancements pursuant to the United States Sentencing Guidelines constitute a denial of the Sixth Amendment right to trial by jury?

TABLE OF CONTENTS

Page

Questions Presented For Review i

Table Of Contents ii

Table Of Authorities iv

Opinions Below 1

Statement of Basis For Jurisdiction In The United States Supreme Court 1

Constitutional Provisions, Statutes And Sentencing Guidelines Involved In Case 1

Statement Of The Case 6

A. Factual Statement 6

B. Proceedings Below 9

Reasons For Granting The Petition 10

A. This Court Should Settle the Important Question of Whether or Not a Business' Knowing Failure to Obtain a Targeted Profit Margin Base Upon that Business' Pricing Policies in Providing a Service is a Cognizable Property Interest Within 18 U.S.C. §§ 1341, 1343 and 1346 and, if so, did Petitioner's Conduct Amount to a Taking of Such Interest 10

B. This Court Should Settle the Important Question of Whether or Not Judicial Enhancements Pursuant to the United States Sentencing Guidelines Constitute a Denial of the Sixth Amendment Right to Trial by Jury 16

Conclusion 30

TABLE OF AUTHORITIES

Page

Cases:

Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) ...*passim*

Blakely v. Washington, -- U.S. ---, 124 S.Ct. 2531 (June 24, 2004) .....*passim*

Carpenter v. United States, 484 U.S. 19, 22, 23 & 28 (1987).....13

Cleveland v. United States, 531 U.S. 12, 22 (2000) ...*passim*

Hammerschmidt v. United States, 265 U.S. 182, 188 (1924).....10

Harris v. United States, 536 U.S. 545, 563 (2002).....17

Kautza v. City of Cody, 812 P.2d 143, 147 (Wyo. 1991) ..11

McMillian v. Pennsylvania, 477 U.S. 79, 88 (1986) 24

McNally v. United States, 483 U.S. 350, 356 (1987) .*passim*

National Organization for Women, Inc. v. Scheidler, 2004 WL 375995 (7th Cir. 2004) 11

Ring v. Arizona, 536 U.S. 584, 602 (2002) 17

Ruckleshaus v. Monsanto Co., 467 U.S. 986, 1006 (1984) 11

Scheidler v. National Organization for Women, Inc., 537 U.S. 393, 405 (2003) 11, 14, 15

United States v. Anderson, 45 F.3d 217, 221-22 (7th Cir. 1995) 24

United States v. Booker, --- F.3d ----, 2004 WL 1535858, *2 (7th Cir. Jul 09, 2004) 18,20,22

United States v. Chatterji, 46 F.3d 1336, 1340 (4th Cir. 1995) 24,25,26

United States v. Croxford, --- F.Supp.2d ----, 2004 WL 1521560, *1 (D.Utah, Jul. 07, 2004) 19,20,21,22

United States v. Enmons, 410 U.S. 396, 406, n. 16 (1973) 15

United States v. Haddock, 12 F.3d 950, 963 (10th Cir. 1993) 24

United States v. Henry, 29 F.3d 112, 13 & 15 (3d Cir. 1994) 11

United States v. Hughes, 775 F.Supp. 348, 350 (E.D.Cal. 1991) 24

United States v. Khan, 969 F.2d 218, 220 (6th Cir. 1992). 25

United States v. Kopp, 951 F.2d 521, 531 (3d Cir. 1991) 23,24

United States v. Medas, --- F.Supp.2d ---, 2004 WL 1498183, *10 (E.D.N.Y., Jul. 1, 2004) 21

United States v. Moored, 38 F.3d 1419, 1423 (6th Cir. 1994) 25

United States v. Nardello, 393 U.S. 286, 290 (1969)..... 15

United States v. Pineiro, --- F.3d ----, 2004 WL 1543170, *6 & *9 (5th Cir. Jul. 12, 2004) 18

United States v. Renick, 273 F.3d 1009, 1027 (11th Cir. 2001) 27

United States v. Robie, 166 F.3d 444 (2d Cir. 1999) 24

United States v. Schneider, 930 F.2d 555, 559 (7th Cir. 1991) 24

United States v. Shamblin, --- F.Supp.2d ----, 2004 WL 1468561, *8 (S.D.W.Va. Jun. 30, 2004) 20,22

United States v. Smith, 951 F.2d 1164, 1169 (10th Cir. 1991) 25

United States v. Starr, 816 F.2d 94, 98 (2d Cir. 1987) 23

United States v. Vitek Supply Corp., 144 F.3d 476, 492 (7th Cir. 1998) 23

United States v. Walters, 997 F.2d 1219, 1221 & 26 n.3 (7th Cir. 1993) 23

United States v. Wilson, supra, 993 F.2d 214, 217 (11th Cir. 1993) 23,24

United States v. Yeager, 331 F.3d 1216, 1225, *rehearing and rehearing en banc denied*, 82 Fed. Appx. 216 (11th Cir. 2003) 23

Webb's Fabulous Pharmacies v. Beckwith, 449 U.S. 155, 161 (1980) 11,12

Statues:

18 U.S.C. § 1341 ..... *passim*

18 U.S.C. § 1343 ..... *passim*

18 U.S.C. § 1951 14

18 U.S.C.A. § 371 1,9

18 U.S.C.A. § 1346 ..... *passim*

28 U.S.C. § 1254(1) 1

U.S.S.G. § 1B1.3 (1997) 19,27

U.S.S.G. § 2B1.1 (1997) 3,26,27

U.S.S.G. § 2D1.1(b)(5)(c) 21

U.S.S.G. § 2D1.1(b)(1) 21

U.S.S.G. § 2F1.1 (1997) 24,26,28

U.S.S.G. § 2F1.1 (b)(1) 19

U.S.S.G. § 3B1.1 (1997) 4,19

U.S.S.G. § 3B1.1(a) 21

U.S.S.G. § 3B1.3 (1997) 5,19

U.S.S.G. § 3C1.1 (1997) 19

U.S.S.G. § 3C1.1 21

U.S.S.G. § 3D1.2(d) (1997) 3

U.S.S.G. § 5E1.1 19

Constitutional Provisions:

U.S. Const. Amend. VI. 1

APPENDIX

	Page
Appendix A – Notice Denying Petitioner's Petition for Rehearing and Rehearing *En Banc*, filed April 26, 2004	1a
Appendix B – Opinion of the Eleventh Circuit Court of Appeals, Filed February 25, 2004	3a
Appendix C – Judgment of the United States Court of Appeals for the Eleventh Circuit, filed February 25, 2004	8a
Appendix D – Judgment and Order from the United States District Court for the Northern District of Georgia, Atlanta Division, filed July 31, 2003	9a
Appendix E – Jury Verdict, filed April 18, 2003	17a

Petitioner John F. Triplett respectfully requests the issuance of a writ of certiorari to review a decision of the United States Court of Appeals for the Eleventh Circuit regarding the application of, and sentencing under, 18 U.S.C. § 371, 1341, 1343 and 1346.

OPINIONS BELOW

The opinions of the Eleventh Circuit are copied at Appendices A and B. A copy of the judgment and commitment order entered by the sentencing judge is at Appendix D.

STATEMENT OF BASIS FOR JURISDICTION IN THE UNITED STATES SUPREME COURT

The Eleventh Circuit entered its judgment on February 25, 2004, and it denied the petition for rehearing en banc on April 26, 2004. (Appendices A & B.) This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND SENTENCING GUIDELINES INVOLVED IN CASE

The Sixth Amendment of the United States Constitution provides in part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury...

U.S.Const. Amend. VI.

18 U.S.C.A. § 371 provides:

> If two or more persons conspire... to commit any offense against the United States... or any agency

thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. § 1341 provides, in pertinent part:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises... for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service... or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both.

18 U.S.C. § 1343 provides in part:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire...in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under

this title or imprisoned not more than 20 years, or both.

18 U.S.C.A. § 1346 provides:

For the purposes of this chapter, the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services.

U.S.S.G. § 1B1.3 (1997) provides in part:

(a) Chapters Two (Offense Conduct) and Three (Adjustments). Unless otherwise specified, (i) the base offense level where the guideline specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter Three, shall be determined on the basis of the following...

(2) solely with respect to offenses of a character for which § 3D1.2(d) would require grouping of multiple counts, all acts and omissions described in subdivisions (1)(A) and (1)(B) above that were part of the same course of conduct or common scheme or plan as the offense of conviction;

(3) all harm that resulted from the acts and omissions specified in subsections (a)(1) and (a)(2) above, and all harm that was the object of such acts and omissions...

U.S.S.G. § 2B1.1, Application Note 2 (1997), provides in part:

"Loss" means the value of the property taken, damaged, or destroyed.

U.S.S.G. § 2F1.1 (1997) provides in part:

(a) Base Offense Level: 6

(b) Specific Offense Characteristics

(1) If the loss exceeded $2,000, increase the offense level as follows...

U.S.S.G. § 2F1.1, Application Note 7 (1997), provides in part:

Valuation of loss is discussed in the Commentary to § 2B1.1 (Larceny, Embezzlement, and Other Forms of Theft). As in theft cases, loss is the value of the money, property, or services unlawfully taken; it does not, for example, include interest the victim could have earned on such funds had the offense not occurred... [I]f an intended loss that the defendant was attempting to inflict can be determined, this figure will be used if it is greater than the actual loss.

U.S.S.G. § 2F1.1, Application Note 8 (1997), provides in part:

The offender's gain from committing the fraud is an alternative estimate that ordinarily will underestimate the loss.

U.S.S.G. § 3B1.1 (1997) provides in part:

Based on the defendant's role in the offense, increase the offense level as follows:

(a) If the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, increase by 4 levels...

(c) If the defendant was an organizer, leader, manager, or supervisor in any criminal activity other than described in (a) or (b), increase by 2 levels.

U.S.S.G. § 3B1.3 (1997) provides in part:

If the defendant abused a position of public or private trust, or used a special skill, in a manner that significantly facilitated the commission or concealment of the offense, increase by 2 levels. This adjustment may not be employed if an abuse of trust or skill is included in the base offense level or specific offense characteristic.

U.S.S.G. § 3C1.1 (1997) provides:

If (A) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the course of the investigation, prosecution, or sentencing of the instant offense of conviction, and (B) the obstructive conduct related to (i) the defendant's offense of conviction and any relevant conduct; or (ii) a closely related offense, increase the offense level by 2 levels.

STATEMENT OF THE CASE

A. Factual Statement

The Henry Pratt Company ("Pratt"), of Aurora, Illinois, is, *inter alia*, a manufacturer of valves. (R-7-2, 72-73.) As part of its business, the company makes and sells valves used in nuclear power plants. (R-7-3.) The Parts Department of Pratt is responsible for maintaining Pratt's products throughout the country. (R-7-5.)

From time to time, an existing nuclear power plant customer would need a replacement valve from the Parts Department. (R-7-6.) Petitioner John F. Triplett was, during the relevant time period, a Senior Project Manager of the Parts Department, and the primary Pratt employee knowledgeable in servicing the needs of Pratt's nuclear power plant customers. (R-7-7, 8, 24.) Valves could not be used in nuclear power plants unless they met strict quality control requirements, evidenced by a plant certification. (R-7-21-22.) Petitioner was extremely knowledgeable about these requirements and how they impacted Pratt's plant customers. (R-7-8, 9 & 24.)

On some occasions, Pratt nuclear power plant customers might have a need for a replacement nuclear valve. (R-7-25-26, 70, 73.) A nuclear power plant risked losing over a million and a half dollars of revenue per day if it was forced to shut down due to a valve failure. (R-7-26, 97-98.) A Pratt customer could buy a new valve from Pratt, but it might take up to 52 weeks for Pratt to manufacture it. (R-7-25, 73.) As an alternative, Pratt would also offer to acquire a surplus nuclear valve on behalf of its customer, and refurbish and certify it so that it would meet regulatory requirements. (R-7-

26-28, 92-93.) By taking this a approach, a customer could have a lawful certified surplus Pratt valve within 8 weeks, substantially reducing the risk of a potential plant shutdown, with its attendant costs. (R-7-27.) Only Pratt could refurbish and certify one of its surplus valves. (R-7-27-28, 100, 101.)

Pratt never engaged in the acquisition, refurbishment and certification of surplus valves, as part of its regular business. (R-7-28 & 90.) Although Pratt was well aware of the demand for, and opportunity to provide, surplus refurbished and certified valves, it rejected, as a business decision, keeping an inventory of surplus valves which could be refurbished and certified. (R-7-23 & 73.) Thus, only on a case-by-case basis did Pratt agree to acquire, refurbish and certify a surplus valve. That is, only if a customer with a need for such a service contacted Pratt and inquired as to whether Pratt could supply it with such a service would Pratt entertain providing such a service. (R-7-29 & 70-71.)

If a prior Pratt customer desired to obtain a surplus valve, Petitioner had the task of locating one which could meet the customer's needs and obtaining a price quote from the vendor. (R-7-31, 33 & 101.) The Petitioner would list the vendor's price quote on a proposal work-up sheet which he submitted to his supervisor. (R-7-75, 83.)

The proposal work-up sheets were reviewed by Pratt's management. (R-7-77, 79, 80.) Only after a specific proposal was approved by Pratt, was it submitted to Pratt's customer. (R-7-77.) The nuclear power plant customer possessed the final authority to authorize Pratt to acquire the surplus valve in question. If the customer approved of Pratt's terms, the customer provided a legally binding purchase order to Pratt.

(R-7-78, 79.) If the customer failed to approve the transaction, Pratt not acquire any surplus valve.

In creating the proposal work-up sheet, Petitioner applied multipliers to the price quote from the vendor to cover Pratt's costs, as well as the gross margin or profit which Pratt sought to make on the potential activity. (R-7-31, 72, 74-75, 94, 76-77, 99-100.) Pratt sought to make an 85% gross margin or profit on each refurbished, certified surplus valve. (R-7-74, 75, 115.) Pratt never revealed its pricing scheme to its customers, or Pratt's actual cost in performing the services. (R-7-78.) However, the vendor's price to acquire the surplus valve was revealed to Pratt's customers. (R-14-5-6.)

Pratt was the only company which could refurbish and certify its previously manufactured valves. (R-7-27-28, 89-90, 91, 100, 101.) Accordingly, Pratt possessed an effective monopoly over the refurbishment and certification of its valves. Any nuclear power plant in need of a refurbished and certified *Pratt* nuclear valve had to obtain the valve from Pratt on Pratt's terms, or otherwise risk a plant shutdown.

In 1995, Petitioner entered into a business relationship with Pump, Valves & Equipment d/b/a the Scruggs Company ("Scruggs Company") of Houston, Texas (then a Pratt commission salesman) to acquire 100 Pratt surplus valves. (R-6-146-154.) In turn, the Scruggs Company, owned and operated by brothers Jimmy and Ted, approached Eurotech Industries, owned by Christopher Mealey, also of Houston, to act as a middleman in the expected sale of the valves to customers of Pratt. (R-6-157-163.)

Petitioner, acting at the request of a Pratt customer, caused Pratt to acquire for that customer surplus valves from Euro-

tech, which were then refurbished and certified. Pratt paid Eurotech, which took five percent (5%) for its services and, in turn, remitted the balance of the money to the Scruggs Company which in turn paid Petitioner monies which may be characterized as kickbacks. Petitioner did not inform Pratt of the nature of his business relationship with the Scruggs Company, the Scruggs Company's relationship with Eurotech and Petitioner's receipt of kickbacks. (R-7-59, 60.)

B. Proceedings Below

On November 20, 2002 a federal grand jury sitting in the Northern District of Georgia returned an indictment charging Petitioner with conspiring to defraud the Henry Pratt Company by use of the mail and interstate facilities in violation of 18 U.S.C. §§ 371, 1341, 1343 and 1346. A plea of not guilty was entered by Petitioner on December 2, 2002. Trial commenced on April 14, 2003 before the Honorable Charles A. Pannell. A verdict of guilty was returned by the jury on April 18, 2003. (Appendix E.)

Sentencing of Petitioner was conducted on July 31, 2003. The district court entered its judgment and commitment order on that day, sentencing Petitioner to imprisonment for 51 months, followed by 36 months supervised release, $100 special assessment, $10,000 fine and $86,512.02 in restitution. (R-14-58.) A notice of appeal of both the conviction and sentence was timely filed on August 6, 2003.

On February 25, 2004, the Eleventh Circuit issued an opinion affirming the decision of the trial court. Petitioner petitioned for rehearing en banc on March 14, 2004. On April 26, 2004, the Eleventh Circuit denied the petition for rehearing en banc.

REASONS FOR GRANTING THE PETITION

A. This Court Should Settle the Question of Whether or Not a Business' Failure to Obtain a Targeted Profit Margin Based Upon Its' Pricing Policies is a Cognizable Property Interest Within 18 U.S.C. §§ 1341, 1343 and 1346 and, if so, Does Interference By an Employee Amount to a Taking of Such Interest

As this Court recognized in *McNally v. United States*, "the original impetus behind the [federal] mail fraud statute was to protect the people from schemes to deprive them of their money or property." *McNally v. United States*, 483 U.S. 350, 356 (1987) (White, J.), *superseded by statute as recognized in, Cleveland v. United States*, 531 U.S. 12, 22 (2000).[1] The language "to defraud" "commonly refer[s] 'to wronging one *in his property rights* by dishonest methods or schemes,' and 'usually signify *the deprivation of something of value* by trick, deceit, chicane or overreaching.'" *Id.* at 359 (emphasis added) (quoting *Hammerschmidt v. United States,* 265 U.S. 182, 188 (1924)). More recently, this Court held in *Cleveland v. United States*, that "for purposes of the mail fraud statute, *the thing obtained must be property in the hands of the victim.*" *Cleveland*, at 15 (emphasis added).[2] Despite the

---

[1] Decisions construing the federal mail fraud statute should be held to apply to the wire fraud statute, and *vice versa*. § 1343 is the "lineal descendant" of § 1341. *McNally*, 430 U.S. at 374 (quoting Rakoff, *The Federal Mail Fraud Statute*, 18 Duquesne L.Rev. 772-773 (1980)).

[2] In 1988, Congress enacted 18 U.S.C. § 1346, to cover "the intangible right of honest services..." which had been protected prior to this Court's decision in *McNally*. *Cleveland*, 531 U.S. at 19 (citing Anti-Drug Abuse Act of 1988, § 7603(a), 18 U.S.C. § 1346). However, "Congress covered only the intangible right of honest services..." *Id.*

indisputable fact that there was no actual, intended or probable economic loss to the victim, Pratt, in this case, the government argued the novel theory to the jury at trial that, even though Pratt made a profit in all relevant circumstances, it was allegedly deprived of a "target profit margin" as a result of Petitioner's conduct. (R10-3-4.) The Eleventh Circuit Court of Appeals erroneously endorsed this theory in affirming Petitioner's conviction, stating "[w]e conclude that the government established sufficiently that, although Pratt made a profit on each resale, it still lost money due to the inflated prices that Triplett and his co-conspirators were charging because it could not attain its target profit margin and that the district court did not err in making a reasonable calculation of the amount of that loss." (Appendix B, p. 7a.)

This Court has held that "... a mere unilateral expectation or an abstract need is not a property interest...," *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155, 161 (1980) (emphasis added); accord *Ruckleshaus v. Monsanto Co.*, 467 U.S. 986, 1006 (1984); *Scheidler v. National Organization for Women, Inc.*, 537 U.S. 393, 405 (2003), on remand, *National Organization for Women, Inc. v. Scheidler*, 2004 WL 375995 (7th Cir. 2004); and other authority, *Kautza v. City of Cody*, 812 P.2d 143, 147 (Wyo. 1991) (mere "hope" to earn a profit is a unilateral expectation, not a property interest); see also *United States v. Henry*, 29 F.3d 112, 13 & 15 (3d Cir. 1994) (where defendants provided information to bank so that it could outbid other banks to serve as depository for toll revenues from state commission by offering a higher interest rate, other banks were merely deprived of fair bidding process which "... was thus valuable to them, but... not a traditionally recognized, enforceable property right.") (em-

phasis added).[3] The evidence at trial established that Pratt was deprived of neither money, nor property, nor services ("Well, basically, I think from these orders, from our production orders that I remember seeing, okay, I don't think we lost money on any of them.") (R-7-95).

The asserted "property" in this case, a target profit margin, was nothing more than "a mere unilateral expectation or an abstract need," *Webb's Fabulous Pharmacies*, 449 U.S. at 161...Such an abstract expectation of Pratt is precisely the sort of "intangible" interest rejected by this Court in *McNally* as outside the scope of § 1341. *McNally*, 483 U.S. at 361. An alleged right to realize greater profits on a transaction than those actually realized, or interference with such alleged right, cannot constitute a legally cognizable property right for the purpose of the federal mail or wire fraud statutes, 18 U.S.C. §§ 1341 and 1343. Whether or not the prices charged by Eurotech for the surplus valves could arguably be said to be "inflated," the prices for each and every valve were well known to Pratt and, more importantly, Pratt's customer who knowingly authorized Pratt to acquire the Eurotech valves. At the end of the day, Pratt's management knew Pratt's expected profit margin on each Eurotech transaction. The pricing decisions as to Pratt's services were those of Pratt's management, not Petitioner. In each instance, Pratt's management knowing accepted the pricing structure.

A conclusion that any abstract target profit margin hoped for by Pratt cannot constitute property which Pratt could be deprived of, or which Petitioner could obtain, is compelled

---

[3] " [N]o man can lose what he never had." Izaak Walton, *The Compleat Angler*, p. 100 (Random House 1998).

by this Court's decision in *Cleveland*, where the Court rejected the government's argument that petitioner frustrated the State's right to control licensure, recognizing that the State's power to regulate did not constitute a "property" interest under the mail fraud statute, but merely comprised "intangible rights of allocation, exclusion, and control..." *Id.* at 23.

To an even greater degree than a state's right to control licensure, any expectation of Pratt in realizing a profit margin greater than that which it actually realized constitutes an intangible interest, and not a cognizable property interest for the purposes of the federal mail or wire fraud statutes. Such an expectation is not "property" which Pratt could actually possess or be deprived of, in contrast to other "intangible" property, such as confidential or proprietary business information, as this Court has held. *See Carpenter v. United States*, 484 U.S. 19, 22, 23 & 28 (1987) (confidential stock information in newspaper column held to constitute "property" for the purposes of the mail and wire fraud statutes). Pratt's "targeted profit margin" was further not an intangible property interest which Congress has recognized, such as the right to honest services. *See* 18 U.S.C. § 1346.

The government relied not on Pratt's knowing structure of each transaction in generating its profits, but on the *abstract possibility* that greater profits could have been made by Pratt on the transactions, but/for Petitioner's conduct. (R10: 6-7.) There was a complete absence of any evidence as to any actual expectation on the part of Pratt for profits greater than

those it actually realized on the transactions.[4] The evidence demonstrated that Pratt was the undisputed master of each transaction in the acquisition, refurbishment and certification of a surplus valve. Pratt had complete control over its profits.[5] Pratt's conduct in acquiring, refurbishing and certifying surplus valves was a *service*—not a manufacturing process. For this reason, if Pratt desired to realize a greater profit margin beyond that which it actually realized, *it merely had to increase its price* to its customer.[6] Pratt's profit margin was not, and could not be, diminished in any way by any action on the part of Petitioner.

Nonetheless, even if an asserted abstract expectation of greater profits is held to constitute property which Pratt could be deprived of, Petitioner's conduct did not constitute a taking of such property interests. As this Court held in *Scheidler v. National Organization for Women, Inc.*, where anti-abortion organizations interfered with the access and operation of lawful abortion clinics were prosecuted pursuant to the extortion provision of the Hobbs Act, 18 U.S.C. § 1951:

---

[4] "The loss which is unknown is no loss at all." Publius Syrus, Maxim 38 (quoted in John Bartlett, *Familiar Quotations* (10th ed. 1919)). According to the government, the valves sold by Eurotech were at "inflated" prices; yet the prices paid were entirely and knowingly paid by Pratt's customers. These very same prices were known to Pratt, and Pratt structured its profit margin thereon.

[5] Only in one instance is there any claim that Pratt *did not* meet its target profit margin. In all other respects, Pratt *did* meet its target profit margin.

[6] Pratt had no legal interest in the cost of the surplus valves charged by Eurotech, which was agreed to, and paid by, Pratt's customers.

> [E]ven when their acts of interference and disruption achieved their ultimate goal of "shutting down" a clinic that performed abortions, such acts did not constitute extortion because petitioners did not "obtain" respondents' property. Petitioners may have deprived or sought to deprive respondents of their alleged property right of exclusive control of their business assets, but they did not acquire any such property. *Petitioners neither pursued nor received "something of value from" respondents that they could exercise, transfer, or sell.* [Cit.]. To conclude that such actions constituted extortion *would effectively discard the statutory requirement that property must be obtained from another...*

Scheidler, 537 U.S. at 405-06 (Rhenquist, J.) (emphasis added; internal citation omitted) (citing *United States v. Nardello,* 393 U.S. 286, 290 (1969)). The extortion provision (like § 1341) required not merely the deprivation of property, but also the acquisition of property. *Id.* at 404 (citing *United States v. Enmons,* 410 U.S. 396, 406, n. 16 (1973)).

Similar to *Scheidler*, Petitioner did not receive *"something of value from"* Pratt[7] As he did not receive something of value from Pratt, *a fortiori,* Petitioner did not *unlawfully take* any property from Pratt. Petitioner did not owe a fiduciary duty to Pratt's nuclear power plant customers. Petitioner's receipt of kickbacks funded by Pratt's customers did not constitute conduct evidencing an *unlawful taking* of property from Pratt. Petitioner's conviction and subsequent sentence

---

[7] Pratt's payment of monies to Eurotech was as an agent of its customer who in fact purchased the surplus valve for Pratt.

pursuant to §§ 371, 1341, 1343 or 1346 were therefore unsustainable.

B. This Court Should Settle the Question of Whether or Not Judicial Enhancements Pursuant to the United States Sentencing Guidelines Constitute a Denial of the Sixth Amendment Right to Trial by Jury

The sentencing judge violated Petitioner's Sixth Amendment right to a jury trial by making judicial findings, based upon a preponderance of the evidence standard, supporting various enhancements under the United States Sentencing Guidelines to Petitioner. (R-14: 19, 21, 28, 37.) The sentence imposed on Petitioner cannot be sustained pursuant to this Court's recent decision in *Blakely v. Washington*, --- U.S. ---, 124 S.Ct. 2531 (June 24, 2004) (Scalia, J.). In *Blakely*, Justice Scalia, writing for the majority, cited the rule from *Apprendi v. New Jersey,* that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 2537 (citing *Apprendi v. New Jersey,* 530 U.S. 466, 490 (2000)). However, the majority proceeded to hold that:

> [T]he "statutory maximum" for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.* [Cits.]. In other words, the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict

> alone does not allow, the jury has not found all the facts "which the law makes essential to the punishment," [cit.] and the judge exceeds his proper authority.

Id. at 2537 (internal citations omitted; emphasis in original) (citing *Ring v. Arizona,* 536 U.S. 584, 602 (2002); *Apprendi,* at 483 & 88; *Harris v. United States,* 536 U.S. 545, 563 (2002); 1 J. Bishop, *Criminal Procedure* § 87, p. 55 (2d ed. 1872)). The majority concluded that "every defendant has the *right* to insist that the prosecutor prove to a jury all facts legally essential to the punishment." *Id.* at 2543 (emphasis in original).

In *Blakely*, the petitioner plead guilty to second-degree kidnaping involving domestic violence and use of a firearm, and assault. *Blakely*, 124 S.Ct. at 2534, 35 & n.2. The Washington Sentencing Reform Act permitted the sentencing judge to impose a sentence above the statutory range if the judge found "substantial and compelling reasons justifying an exceptional sentence." *Id.* at 2535 (citations omitted). The Act listed a non-exclusive list of aggravating factors to justify such a departure. *Id.* The petitioner's standard sentencing range was 49 to 53 months, however, the sentencing judge found that the petitioner had acted with "deliberate cruelty," a ground for departure under the Act, and sentenced the petitioner to 90 months, three years greater than the petitioner's statutory minimum. *Id.* The petitioner appealed, whereupon the Washington Court of Appeals affirmed and the Washington Supreme Court denied discretionary review. *Id.* at 2536. This Court reversed the petitioner's conviction for failure to comply with the procedures of the Sixth Amendment, noting that the sentencing judge could not have imposed the in-

creased sentence on the basis of the facts admitted in the guilty plea alone. *Id.* at 2537 & 43.

Notwithstanding the fact that *Blakely* concerned a state sentencing scheme, and that the majority did not find that determinate sentencing schemes were unconstitutional and stated in a footnote that "[t]he Federal Guidelines are not before us, and we express no opinion on them," 124 S.Ct. at 2540 & n. 8, Justice O'Connor, in a dissenting opinion in which Justice Breyer joined and two other Justices joined in part, observed that the majority all but expressly held guidelines schemes unconstitutional. *Id.* at 2543 (O'Connor, J., dissenting) (citing *Apprendi,* 530 U.S. at 494; *Ring,* 536 U.S. at 613). The dissenters noted that there was no distinction between the State sentencing statute at issue in *Blakely* and the Federal Sentencing Guidelines. *Id.* at 2549. "This suggests that the hard constraints found throughout chapters 2 and 3 of the Federal Sentencing Guidelines, which require an increase in the sentencing range upon specified factual findings, will meet the same fate." *Id.*

Federal courts interpreting the majority's holding in *Blakely* have questioned the continuing validity of the Federal Sentencing Guidelines. *See United States v. Booker*, --- F.3d ----, 2004 WL 1535858, *2 (7th Cir. Jul. 09, 2004) (*Blakely* "dooms the guidelines insofar as they require that sentences be based on facts found by a judge"); *United States v. Pineiro*, --- F.3d ----, 2004 WL 1543170, *6 & *9 (5th Cir. Jul. 12, 2004) ("[u]ndeniably, *Blakely* strikes hard at the prevailing understanding of the Guidelines"; holding that the statutory maximum, for the purposes of *Blakely*, are those set forth in the United States Code). Following *Blakely*, several courts have concluded that there is no meaningful

distinction between the Washington statute and the Federal Guidelines. *See Booker* at *2; *United States v. Croxford*, --- F.Supp.2d ----, 2004 WL 1521560, *1 (D.Utah, Jul. 07, 2004).

At sentencing herein, the district court judge found by a preponderance of evidence that Petitioner was a manager or supervisor of criminal activity involving five (5) or more individuals, and enhanced Petitioner's sentence by three (3) levels for role in the offense, under U.S.S.G. § 3B1.1 (1997). (R-14-19.) Petitioner's counsel objected to the enhancement. (R-4-15-17.) The sentencing court then overruled Petitioner's objection to a two (2) level enhancement for abuse of a position of trust pursuant to U.S.S.G. § 3B1.3 (1997). (R-14-21). Petitioner's sentence was further increased, over Petitioner's objection, by two (2) levels for obstruction of justice, pursuant to U.S.S.G. § 3C1.1 (1997). (R-14-21.) In addition to these enhancements, the judge erroneously adjusted Petitioner's offense level under U.S.S.G. § 2F1.1(b)(1) (1997), for economic loss, including amounts relating to relevant conduct under U.S.S.G. § 1B1.3 (1997). (R-14-37, 46.) These enhancements for loss and loss caused by alleged relevant conduct, which were objected to by the defense, served to increase Petitioner's sentence by eight (8) levels. (R-14-37, 46.) [8]

In the wake of *Blakely*, several courts have held upward enhancements or adjustments to a sentence pursuant to the

---

[8] As the district court found a "loss" under § 2F1.1(b), and Pratt was the alleged victim, the sentencing court ordered Petitioner to pay restitution to Pratt as a condition of his sentence, pursuant to U.S.S.G. § 5E1.1, notwithstanding the testimony by Pratt's employee, Polito, that Pratt suffered *no loss*. (Appendix D.)

Guidelines, such those applied to Petitioner, which are not based upon facts found beyond a reasonable doubt by a jury and which increase a defendant's sentence above the maximum sentence imposed by the Guidelines, to be inapplicable, if not unconstitutional. *See Booker*, 2004 WL 1535858 at *2; *Croxford*, 2004 WL 1521560 at *6; *United States v. Shamblin*, --- F.Supp.2d ----, 2004 WL 1468561, *8 (S.D.W.Va. Jun. 30, 2004). Judge Richard Posner, writing for the Seventh Circuit Court of Appeals in *United States v. Booker*, held that *Blakely* requires facts bearing on the length of a defendant's sentence to be found by a jury. 2004 WL 1535858 at *2. The Seventh Circuit reversed the defendant's sentence where the sentencing judge had found, by a preponderance of the evidence, that the defendant had distributed a greater quantity of drugs than that jury had found, and that he had obstructed justice, holding that the defendant had a right "to have the jury determine the quantity of drugs he possessed and the facts underlying the determination that he obstructed justice." *Id.* at *1 & *4. It further held that the "statutory maximum" was not imposed by federal statute, but by the Guidelines. *Id.* at *2.

In *United States v. Shamblin*, the court held that:

> Under the federal Sentencing Guidelines, drug amounts, enhancements based on specific offense characteristics, and upward departures all have the same effect--namely, they all *increase* the maximum permissible sentence under the Guidelines. A judge's reliance on such factors at sentencing, if not proven beyond a reasonable doubt, is therefore unconstitutional.

2004 WL 1468561 at *1 (emphasis in original). The court noted that the defendant's plea admitted only that he was a member of a conspiracy to manufacture methamphetamine and purchased drugs in furtherance of the conspiracy. *Id.* at *8. Yet while his base offense level was 34, it was further increased for possession of a dangerous weapon, pursuant to U.S.S.G. § 2D1.1(b)(1); manufacturing methamphetamine and creating a substantial risk of harm to the life of a minor, pursuant to U.S.S.G. § 2D1.1(b)(5)(c); for an organizer or leader of a criminal activity that involved five or more participants, pursuant to U.S.S.G. § 3B1.1(a); for obstruction of justice, pursuant to U.S.S.G. § 3C1.1; yielding an offense level of 48. *Id.* at *3; *see also United States v. Medas*, --- F.Supp.2d ---, 2004 WL 1498183, *10 (E.D.N.Y., Jul. 1, 2004) (holding that the facts supporting an enhancement pursuant to § 3B1.1, should be found by a jury). In regard to relevant conduct, the court observed that the enhancement "requires an assessment of factors which are not elements of, and may not be factually related to, the charged offense." *Id.* at *6. It cited the fact that the defendant's sentence "was based almost entirely on relevant conduct and sentencing enhancements that were not proven to a jury beyond a reasonable doubt." *Id.* at *9.

Similarly, the court in *United States v. Croxford*, held that there was no way it could sentence the defendant "under the federal sentencing guidelines without violating his right to trial by jury..." 2004 WL 1521560 at *6. It recognized that applying enhancements for obstruction of justice under § 3C1.1, and relevant conduct under § 1B1.3, would require findings of fact by the court and increase the defendant's penalty beyond the maximum otherwise specified by the Guidelines. *Id.* at *7. The court stated that:

> It is clear that after *Blakely* this court cannot impose additional time on a criminal defendant through a judicial finding that he is guilty of obstruction of justice. Nor can the court impose an enhancement under the relevant conduct... This conduct was not charged in the indictment and was not admitted by the defendant. Thus, a factual finding by this court would be required to apply the enhancement. The clear command of *Blakely* is that such factual findings, unless admitted by the defendant, must be made by a jury.

Id.

All of the enhancements to Petitioner's sentence pursuant to the Federal Guidelines required additional findings of fact. The indictment provided Petitioner with no notice of the enhancements. Furthermore, the jury's verdict merely stated that the jury had found Petitioner guilty of (1) conspiring to defraud Pratt by the United States mail; (2) conspiring to obtain money from Pratt by means of false and fraudulent pretenses, representations, and promises; (3) conspiring to deprive Pratt of honest services; and (4) conspiring to defraud Pratt by interstate wire transmission; (5) conspiring to obtain money from Pratt by means of false and fraudulent pretenses, representations, and promises by means of interstate wire transmissions; and (6) conspiring to deprive Pratt of honest services by means of interstate wire transmissions. (Appendix E.) Precisely as with the enhancements and adjustments in *Blakely*, *Booker*, *Shamblin* and *Croxford*, the sentencing court here found additional facts not contained in the jury's verdict in order to apply the Guidelines enhancements to Petitioner's sentence. These facts should have been

found by a jury beyond a reasonable doubt--not determined by a judge based upon a mere preponderance of the evidence. The majority of Petitioner's term of punishment, as in *Shamblin*, was the direct result of these enhancements.

The facts of this case uniquely frame the unconstitutionality of judicial enhancements in sentencing, based on a preponderance of evidence standard, as contrasted with proof beyond a reasonable doubt to the satisfaction of a jury. A particularly egregious example is perhaps found in the sentencing judge's decision to enhance Petitioner's sentence for a non-existent "loss" under § 2F1.1. Pursuant to the predominant caselaw interpreting § 2F1.1, no judicial enhancement was warranted based on the facts of petitioner's case.[9] Nonetheless, Petitioner's sentence was enhanced by the district court notwithstanding the fact that Pratt, the alleged victim of the fraud, realized substantial profits on all

---

[9] A defendant may not be punished by the inclusion of "speculative losses" in the sentencing calculation under § 2F1.1. *United States v. Vitek Supply Corp.*, 144 F.3d 476, 492 (7th Cir. 1998); *see also Haddock*, 12 F.3d at 963 (10th Cir. 1993) ("actual loss" is "'the amount of money the victim has actually ended up losing at the time of sentencing, *not what it could have lost.*'") (emphasis added) (quoting *United States v. Kopp*, 951 F.2d 521, 531 (3d Cir.1991)).Courts have typically eschewed the use of similar speculative values in the calculation of loss under the Guidelines. *See United States v. Yeager*, 331 F.3d 1216, 1225, *rehearing and rehearing en banc denied*, 82 Fed. Appx. 216 (11th Cir. 2003) ("Opportunity-cost loss may not be considered at sentencing."); *United States v. Wilson*, *supra*, 993 F.2d 214, 217 (11th Cir. 1993) (incidental or consequential injury may not be included in the amount of loss); *Walters*, *supra*, at 1227 (losses which were mere byproducts of a fraudulent scheme are not cognizable losses under the mail fraud statute); *Starr*, 816 F.2d at 99-100 (observing that a "defeated expectation" alone does not affect the value of a transaction to a party).

transactions. The adjustments to Petitioner's sentence based upon amount of loss pursuant to § 2F1.1(b), after amounts attributed to relevant conduct were factored in, became the "tail which wags the dog of the substantive offense." *Blakely*, 124 S.Ct. at 2539 (citing *McMillan v. Pennsylvania*, 477 U.S. 79, 88 (1986)).

The version of § 2F1.1 which Petitioner was sentenced under provided for a base offense level of six (6), with specific offense characteristic enhancements to a defendant's offense level for different levels of "loss." U.S.S.G. § 2F1.1 (1997). The Sentencing Commission's commentary to § 2F1.1 defined "loss" as "the value of the money, property, or services unlawfully taken..." U.S.S.G. § 2F1.1, Application Note 7. Relevant cases interpreting § 2F1.1 held that, for the purposes of the guideline, "loss" meant actual economic or monetary loss. *See United States v. Haddock*, 12 F.3d 950, 963 (10th Cir. 1993) ("actual loss" is "'the amount of *money* the victim has actually ended up losing at the time of sentencing.") (emphasis added) (quoting *United States v. Kopp*, 951 F.2d 521, 531 (3d Cir.1991)); *United States v. Wilson*, 993 F.2d 214, 217 (11th Cir. 1993). Therefore, "[i]f there [i]s no economic loss to the [victim], *there [i]s no 'loss' for Guidelines purposes*." *United States v. Robie*, 166 F.3d 444 (2d Cir. 1999) (emphasis added) (citing *United States v. Chatterji*, 46 F.3d 1336, 1340 (4th Cir.1995); *United States v. Andersen*, 45 F.3d 217, 221-22 (7th Cir.1995)); *United States v. Hughes*, 775 F.Supp. 348, 350 (E.D.Cal. 1991). Pursuant to this rule, several Circuits have held that where the Government fails to prove actual, intended or potential economic loss, a court cannot increase a defendant's offense level for loss under § 2F1.1. *United States v. Schneider*, 930 F.2d 555, 559 (7th Cir.1991) (enhancements pursuant to §

2F1.1 constitute "bonus punishment points [awarded by the Guidelines under § 2F1.1 for different levels of proven loss beginning with $2,000."); *United States v. Smith*, 951 F.2d 1164, 1169 (10th Cir. 1991); *United States v. Khan*, 969 F.2d 218, 220 (6th Cir. 1992); *United States v. Moored*, 38 F.3d 1419, 1423 (6th Cir. 1994); *Chatterji*, at 1342-43.

The fact that Pratt realized an *economic gain* from each transaction meant that the Government did not, and could not, prove that Pratt suffered any economic loss. Indeed, Pratt's employee admitted such during trial. (R-7-95.) The sentencing court, therefore, could not increase Petitioner's sentence on the basis of economic loss. Current U.S.S.G. § 2B1.1, into which § 2F1.1 was merged by the Commission's amendment of November 1, 2001, has codified the requirement of proof of economic loss. U.S.S.G. § 2B1.1, Appendix C, § 617 (2002). The guideline defines "actual loss" as "the *reasonably foreseeable pecuniary harm* that resulted from the offense." U.S.S.G. § 2B1.1, Application Note 3(A)(i) (2002) (emphasis added).[10] "Pecuniary harm," in turn, is defined as "*harm that is monetary or that otherwise is readily measurable in money.*" *Id.*, Application Note 3(A)(ii) (emphasis added). Pratt, in this case, suffered no "pecuniary harm" in that it neither lost money or anything measurable in money. The Commission's changes to the definition of loss in § 2B1.1 provide cogent support for a conclusion an enhancement pursuant to § 2F1.1(b) is inapplicable, absent

---

[10] The Commission found it necessary to redefine the term "loss" in order to resolve conflicts between the Circuits, address various application issues and to promote consistency in application. U.S.S.G. Appendix C, § 617.

proof of any actual, intended or potential pecuniary harm to the alleged victim.

At sentencing, the judge erroneously used the amount of gain to Petitioner, the Scruggs Company and Eurotech. (R-14-46.) No enhancement should have been made to Petitioner's sentence on the basis of any gain to Petitioner as a result of the rule that the gain "may be used only as an alternative method of calculation *when there is in fact a loss*, and only if use of the gain results in a '*reasonable estimate of the loss.*'" *Andersen*, 45 F.3d at 221 (emphasis added) (quoting U.S.S.G. § 2F1.1, Application Note 8; *accord Prigmore*, 1996 WL 464030 at *6; *see also Chatterji*, 46 F.3d at 1340 (citing *Haddock*, 12 F.3d at 960); *see also* U.S.S.G. § 2B1.1, Application Note 3(B) (2002). Both Pratt, the victim, and Petitioner gained in this case. Any gain therefore cannot constitute a reasonable estimate where there is no actual loss which can be determined.

In addition to the entire absence of any evidence showing any actual pecuniary loss to Pratt, there was no evidence that Petitioner intended to cause any loss to Pratt. § 2F1.1 provides that where the loss which a defendant intended to inflict can be determined, and is greater than the actual loss inflicted, the intended loss may be used as the measure of loss. U.S.S.G. § 2F1.1, Application Note 7 (1997). Petitioner did not intend any loss to Pratt, however unlikely, as a result of the Eurotech transactions. Petitioner clearly cannot be held to have intended any loss where he was fully aware that Pratt would profit from each transaction.

Furthermore, there was almost no possibility Pratt could have lost any money on it is acquisition, refurbishment and certification of surplus nuclear valves on behalf of its cus-

tomers. Pratt only acquired a specific surplus valve after (1) a nuclear power plant customer had made a specific request to Pratt that it acquire the valve, (2) Pratt had drawn up a proposal for the acquisition, refurbishment and certification of the valve, which included Pratt's profit, and the proposal had been approved by numerous officers at Pratt; (3) the proposal had been submitted to the customer and the customer executed a binding purchase order in which it agreed to both the cost of the surplus valve and the profit Pratt would make on the transaction. Petitioner was intimately familiar with this process, which had to be completed before Pratt would acquire any surplus valve.

Under current § 2B1.1, "reasonably foreseeable pecuniary harm" means "pecuniary harm that the defendant knew or, under the circumstances, reasonably should have known, was a potential result of the offense." U.S.S.G. § 2B1.1, Application Note 3(A)(iv) (2002).[11] Since Pratt obtained a binding commitment from its customer to pay Pratt's desired profit for its services and the cost of the surplus valve before it ever acquired the valve, no potential for pecuniary harm to Pratt was reasonably foreseeable to Petitioner. Even granting a risk of loss, however slight, to Pratt, under former § 2F1.1 "'the risk created enters into the determination of the offense level only insofar as it is incorporated into *the base offense level*. Unless clearly indicated by the guidelines, harm that is merely risked is not to be treated as the equivalent of harm that occurred.'" *United States v. Renick*, 273 F.3d 1009, 1027 (11th Cir. 2001) (quoting U.S.S.G. § 1B1.3, Applica-

---

[11] "[T]his standard better ensures the inclusion in loss of those harms that reflect the seriousness of the offense and the culpability of the offender." U.S.S.G. Appendix C, § 617 (2002).

tion Note 5). Any theoretical risk of loss to Pratt therefore could not supply a basis to enhance Petitioner's offense level pursuant to § 2F1.1(b). Pratt's speculative expectation of a greater target profit could not also be used as the measure of loss, pursuant to § 2F1.1.

In regard to the sentencing court's other enhancements to Petitioner's sentence the facts supporting Petitioner's enhancements for relevant conduct, role in the offense and obstruction of justice should have been found by a jury. By the same token Petitioner's enhancement for abuse of trust entailed findings of fact, as did the sentencing court's calculation of the amount to be used for the purpose of establishing the amount of loss under § 2F1.1.

The facts determined by the sentencing judge in support of the enhancements bore directly on the length of Petitioner's sentence, and whether Petitioner was entitled to a lesser sentence, pursuant to *Blakely*. Petitioner's "statutory maximum" sentence under the Guidelines, for the purposes of *Apprendi* and *Blakely*, which could be imposed upon Petitioner was five (5) years, or 60 months, for a conspiracy to violate the federal mail and wire fraud statutes. *See* 18 U.S.C. §§ 371, 1341, 1343 & 1346. Furthermore, Petitioner's base offense level under § 2F1.1, without any adjustment for loss, was six (6) and his criminal history category I, giving Petitioner a base sentencing range of zero to six (0 to 6) months. *See* U.S.S.G. § 2F1.1. In subjecting Petitioner to the Guidelines enhancements, the sentencing judge increased Petitioner's offense level by eighteen (18) levels to twenty-four (24), resulting in a sentencing range of 51 to 63 months. (R-14 47). The sentencing court's findings of fact and application of the

enhancements increased Petitioner's sentence far in excess of the maximum sentence authorized by the jury's verdict.

The rule of *Apprendi* serves to ensure that a judge's authority to sentence is derived from the jury's verdict. No basis existed in the jury's verdict to support any of the enhancements and the increased punishment of Petitioner. Pursuant to *Apprendi* and *Blakely*, Petitioner had a "right to insist that the prosecutor prove to a jury all facts legally essential to the punishment." *Blakely*, 124 S.Ct. at *9. In determining these facts itself and applying the enhancements to Petitioner, the sentencing court exceeded its authority and violated Petitioner's Sixth Amendment rights.

CONCLUSION

This Court should grant the petition for certiorari.

Respectfully submitted,

CRAIG A. GILLEN
WILMER PARKER, III
Counsel of Record
GILLEN PARKER & WITHERS, LLC
One Securities Centre, Suite 105
3490 Piedmont Road, N.E.
Atlanta, Georgia 30305
(404) 842-9700

APPENDIX

APPENDIX A – NOTICE DENYING PETITIONER'S PETITION FOR REHEARING AND REHEARING *EN BANC*, FILED APRIL 26, 2004

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 03-14099-DD

United States of America,

Plaintiff-Appellee,

versus

John F. Triplett,

Defendant-Appellant.

- - - - - - - - - - - - - - - - - - - -

On Appeal from the United States District Court for the Northern District of Georgia

- - - - - - - - - - - - - - - - - - - -

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING *EN BANC*

(Opinion _____, 11th Cir., 19___, ____F.2d ____).

Before: DUBINA, CARNES and HULL, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active services on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT :

_____

UNITED STATES CIRCUIT JUDGE

APPENDIX B – OPINION OF THE ELEVENTH CIRCUIT COURT OF APPEALS, FILED FEBRUARY 25, 2004

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 03-14099
Non-Argument Calendar

D.C. Docket No. 02-00718-CR-1-1

United States of America,

Plaintiff-Appellee

versus

John F. Triplett,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Georgia

(February 25, 2004)

Before DUBINA, CARNES and HULL, Circuit Judges.

PER CURIAM:

Appellant John F. Triplett appeals his conviction and 51-month sentence for conspiracy to commit mail, wire, and honest services fraud, in violation of 18 U.S.C. § 371. On

appeal, Triplett argues that his conviction should be reversed because the indictment was constructively amended, in that the district court allowed the government to present evidence that he was guilty of the uncharged conduct of defrauding his employer of a right to make greater profits. He also argues that his sentence should be vacated for the following reasons: (1) uncharged conspiracies improperly were included as relevant conduct; (2) an abuse-of-trust enhancement was improper because such abuse was inherent in the charged conspiracy to commit honest services fraud; (3) a four-level role enhancement was improper because the conspiracy did not involve five or more participants; (4) the amounts of loss and restitution were miscalculated; and (5) an obstruction-of-justice enhancement was improper because the obstructive conduct related to a different investigation.

Although we have not stated specifically the standard of review for appeals involving constructive amendments, we generally review an indictment's sufficiency *de novo. United States v. Ramirez*, 324 F.3d 1225, 1226 (11th Cir. 2003) (citation omitted). With respect to sentencing issues, we review the district court's findings of fact for clear error and its application of the Sentencing Guidelines to the facts *de novo. United States v. Blanc,* 146 F.3d 847, 851 (11th Cir. 1998).

Triplett argues that his indictment was constructively amended and that as a result, his conviction should be reversed. "A constructive amendment occurs when the essential elements of the offense contained in the indictment are altered to broaden the possible bases for conviction beyond what is contained in the indictment." *United States v. Castro,* 89 F.3d 1443, 1452-53 (11th Cir. 1996) (internal citations

omitted). An improper amendment can occur through either statements made by the government at trial or erroneous jury instructions. *Id* at 1453. In determining whether an indictment was constructively amended, we look at whether the prosecutor's actions or the court's instructions "viewed in context" literally or effectively expanded the indictment. *United States v. Behety*, 32 F.3d 503, 508-09 (11th Cir. 1994). After reviewing the record and the parties' briefs, we conclude that no constructive amendment of the indictment occurred because no change in the objects of the fraud occurred and the essential elements remained unchanged from those in the indictment.

Triplett also argues that the district court erred in counting as relevant conduct, for sentencing purposes, similar schemes in which Triplett engaged. Relevant conduct includes all acts and omissions committed by the defendant "that were part of the same course of conduct or similar common scheme or plan as the offense of conviction." U.S.S.G. § 1B1.3(a)(2). Offenses that are "substantially connected to each other by at least one common factor, such as common victims, common accomplices, common purpose, or similar *modus operandi*" qualify as a common scheme or plan. U.S.S.G. § 1B1.3, comment. (n.9(A)). We conclude that all of the transactions shared sufficient common factors to have arisen from a common scheme or plan. Thus, the district court did not clearly err in counting the transactions as relevant conduct.

Triplett contends that the district court erred in applying an abuse of trust enhancement pursuant to U.S.S.G. § 3B1.3, which provides for a two-level enhancement "[i]f the de-

fendant abused a position of public or private trust, or used a special skill, in a manner that significantly facilitated the commission or concealment of the offense." U.S.S.G. § 3B1.3. Whether a defendant occupied a position of trust meriting application of the enhancement is viewed from the perspective of the victim of the crime. *United States v. Garrison*, 133 F.3d 831, 837 (11th Cir. 1998). We conclude that the district court properly applied the abuse-of-trust enhancement because the jury convicted Triplett not only of depriving Pratt of honest services, but also for conspiring to use mail and interstate wire to defraud Pratt and obtain money from Pratt by false pretenses, offenses for which abuse of trust is not included in the base offense level. Furthermore, Triplett was granted almost unquestioned authority with regard to his duties. Therefore, Triplett abused a portion of trust in a manner that significantly facilitated the commission of the offense. *Id.* At 838 ("Since the 'primary concern of § 3B1.3 is to penalize defendants who take advantage of a *position* that provides them freedom to commit or conceal a difficult-to-detect wrong,' only such a defendant whose position enables or significantly facilitates the offense is eligible for this enhancement.")

Triplett next argues that the district court erred by applying a four-level enhancement because the conspiracy did not involve five or more participants. A "participant" is "a person who is criminally responsible for the commission of the offense, but need not have been convicted." U.S.S.G. § 3B1.1, comment. (n.1). We conclude that, taking into account all of Triplett's relevant conduct, sufficient evidence existed to indicate that the conspiracy indeed involved five

or more participants, so that the district court did not err in applying the enhancement.

Triplett argues that the district court erred in calculating the amount of loss and in ordering restitution because Pratt made a profit on each refurbished surplus valve that it sold. Triplett argues that because Pratt made a profit, Pratt did not suffer a loss or "economic harm." Once the district court has established that a loss has occurred, it is required only to "make a reasonable estimate of the loss, given the available information." *United States v. Yeager*, 331 F.3d 1215, 1224 (11th Cir. 2003). We conclude that the government established sufficiently that, although Pratt made a profit on each resale, it still lost money due to the inflated prices that Triplett and his co-conspirators were charging because it could not attain its target profit margin and that the district court did not err in making a reasonable calculation of the amount of that loss. Accordingly, the district court did not err in ordering restitution.

Finally, Triplett argues that the district court erred by enhancing his sentence based on its finding that he obstructed justice. Because Triplett destroyed documents during the investigation of his kickback activities and attempted to influence the testimony of potential witnesses, we conclude that the district court did not clearly err by applying an obstruction of justice enhancement to his offense level.

Based on the foregoing, and because we conclude there is no merit to any of the issues Triplett argues in this appeal, we affirm his conviction and sentence.

AFFIRMED.

APPENDIX C – JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, FILED FEBRUARY 25, 2004

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 03-14099

District Court Docket No.
02-00718-CR-1-1

United States of America,

Plaintiff-Appellee,

versus

John F. Triplett,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Georgia

JUDGMENT

It is hereby ordered, adjudged, and decreed that the attached opinion included herein by reference, is entered as the judgment of this Court.

Entered: February 25, 2004
For the Court: Thomas K. Kahn, Clerk
By: Gilman, Nancy

APPENDIX D – JUDGMENT AND ORDER FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION, FILED JULY 31, 2003

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Case No: 1:02-CR-718-CAP

UNITED STATES OF AMERICA,

-vs-

JOHN F. TRIPLETT,

Defendant's Attorney:
Wilmer Parker

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

The defendant was found guilty by jury on Count(s) 1 of the Indictment.

Accordingly, the defendant is adjudged guilty of such count(s) which involves the following offense:

Title & Section	Nature of Offense	Count No.
18 USC § 371	Conspiracy to Commit Mail, Wire and Honest Services Fraud	1

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay the special assessment of **$100.00** which shall be due immediately.

IT IS FURTHER ORDERED that the Defendant shall notify the United States Attorney for this district within thirty days of any changes of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid.

Date of Imposition of Sentence:

July 31, 2003

Defendant's Soc. Sec. No.: 369-38-6672
Defendant's Date of Birth: July 23, 1940
Defendant's Mailing Address:
365 Royal Birkdale Court
Duluth, Georgia 30097

Signed this the_____ Day of July, 2003.

_____

Charles A. Pannell, Jr.
United States District Judge

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **Fifty-One (51months.)**

The Court recommends the Atlanta Federal Prison Camp. Eglin Air Force Base or Maxwell Air Force Base.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons as notified by the United States Marshal.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on_____ to _____

at _____, with a certified copy

of this judgment.

_____

United States Marshal

By:_____

Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **Three (3) years**.

While on supervised release, the defendant shall not commit another federal, state or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard and special conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

Within 72 hours of release from the custody of the Bureau of Prisons, the defendant shall report in person to the probation office in the district to which the defendant is released.

The defendant shall not own, possess or have under his control any firearm, dangerous weapon or other destructive device.

The defendant shall submit to a search of his person, property, real or personal, residence, place of business or employment, and/or vehicle(s) at the request of the United States Probation Officer.

The defendant shall make a full and complete disclosure of finances and submit to an audit of financial documents, at the request of the United States Probation Officer.

The defendant shall pay any financial penalty that is imposed by this judgment.

The defendant shall not incur new credit charges or open additional lines of credit without the approval of the probation officer.

The defendant shall pay any portion of the restitution that is not paid in full at the time of the defendant's release from imprisonment shall become a condition of supervision and be paid at the monthly rate of $150.00 plus 25% of any gross monthly income in excess of $2,000.00.

The defendant shall pay any portion of the fine that is not paid in full at the time of the defendant's release from imprisonment shall become a condition of supervision and be paid at the monthly rate of no less that $500.00.

The periodic drug testing mandated by the Violet Crime Control and Law Enforcement Act of 1994 is hereby suspended. The Court finds this offense is not drug related, and the defendant has no current or past history of substance abuse.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state, or local crime. In addition:

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;

2. The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4. The defendant shall support his or her dependents and meet other family responsibilities;

5. The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6. The defendant shall notify the probation officer within **72** hours of any change in residence or employment;

7. The defendant shall refrain from the excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician, and shall submit to periodic urinalysis tests as directed by the probation officer to determine the use of any controlled substance;

8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9. The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11. The defendant shall notify the probation officer within 72 hours of being arrested or questioned by a law enforcement officer;

12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

FINE

The defendant shall pay a fine in the amount of $10,000.00 and the fine shall be paid in full immediately. If the defendant is unable to make an immediate payment, he shall make fine payments from any wages he may earn in prison in accordance with the Bureau of Prisons Financial

Responsibility Program. Any portion of the fine that is not paid in full at the time of the defendant's release from imprisonment shall become a condition of supervision and be paid at the monthly rate of $500.00.

If the fine is not paid, the court may sentence this defendant to any sentence which might have been originally imposed. See 18 U.S.C. 3614

RESTITUTION

The defendant shall make restitution to the following Company in the following amount:

Name of Payee	**Amount of Restitution**
The Henry Pratt Company 401 South Highlands Avenue Aurora, Illinois 60506	$86,512.02

The restitution shall be paid in full immediately. If the defendant is unable to make an immediate payment, she shall make restitution payments from any wages she may earn in prison in accordance with the Bureau of Prisons Financial Responsibility Program. Any portion of the restitution that is not paid in full at the time of the defendant's release from imprisonment shall become a condition of supervision and be paid at the monthly rate of $150.00 plus 25% of any gross monthly income in excess of $2,000.00.

The defendant shall notify the United States Attorney for this district within 30 days of any change of mailing or residence address that occurs while any portion of the restitution remains unpaid.

APPENDIX E – JURY VERDICT, FILED APRIL 18, 2003

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

CIVIL ACTION
NO. 1:02-CR-718-CAP

UNITED STATES OF AMERICA,

vs.

JOHN F. TRIPLETT,

Defendant

VERDICT

A. (Circle One)

We the jury find the Defendant. NOT GUILTY **GUILTY** of the charge of CONSPIRACY.

B. (Circle Yes or No to each question that you are in unanimous agreement)

1. The defendant conspired to defraud The Henry Pratt Company by the United States Mail.

YES NO

2. The defendant conspired to obtain money from the Henry Pratt Company by means of false and fraudulent pretenses, representations, and promises by the United States Mail.

YES NO

3. The defendant conspired to deprive The Henry Pratt Company of the honest services of Defendant John Triplett by the United States Mail.

YES NO

4. The defendant conspired to defraud The Henry Pratt Company by interstate wire transmissions.

YES NO

5. The defendant conspired to obtain money from The Henry Pratt Company by means of false and fraudulent pretenses, representations, and promises by interstate wire transmissions.

YES NO

6. The defendant conspired to deprive The Henry Pratt Company of the honest services of Defendant John Triplett by interstate wire transmission.

YES NO

This the _____day of April, 2003

_____

Foreperson